

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 23, 2007 Session

LARRY LAMONT THOMPSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 3485 Monte Watkins, Judge

No. M2006-02355-CCA-R3-PC - Filed February 7, 2008

The petitioner, Larry Lamont Thompson, appeals from the Davidson County Criminal Court's denial of his petition for post-conviction relief from his assault conviction. He claims on appeal that he was deprived of his right to a trial de novo in Criminal Court in the underlying proceedings, that his counsel provided ineffective assistance, and that he did not enter a knowing and voluntary guilty plea to the conviction offense. We hold that the trial court erred in denying relief and reverse its judgment and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;
Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. McLIN, JJ., joined.

K. Robert Barlowe, Nashville, Tennessee, for the appellant, Larry Lamont Thompson.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Roger D. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in the conviction proceedings, the petitioner was convicted at a bench trial in General Sessions Court and received a six-month jail sentence to be served at one hundred percent. Because he was concerned that his probation for another conviction would be violated and revoked based upon the present case, he filed an appeal to Criminal Court. Before the case was called for trial in Criminal Court, his probation was revoked in the earlier case. The prosecutor and defense counsel then entered into an agreement to amend the General Sessions Court judgment to reflect that the petitioner pled guilty and received a concurrent sentence of six months at thirty percent, which minimized the time he had to serve in jail. There was no plea acceptance hearing at which the agreement was announced and at which the petitioner was advised of his rights. Counsel

testified that he explained the agreement to the petitioner in terms of “it wouldn’t mean extra time” and that the petitioner consented. The petitioner, however, testified that nothing was ever explained to him and that he had never seen the amended judgment form.

At the post-conviction hearing, the petitioner sought relief on the basis of (1) ineffective assistance of counsel and (2) lack of a plea hearing. After receiving evidence, the trial court found that the petitioner failed to establish by clear and convincing evidence that counsel provided ineffective assistance and that the petitioner’s testimony that he did not consent to entering a plea and was uninformed of the consequences of the plea was incredible. The court found that the amended judgment contained a clerical error in that it reflected the petitioner had pled guilty, rather than he had been found guilty at a bench trial. The court found that the error was harmless and should be corrected. Thus, the trial court denied relief.

On appeal, the petitioner argues that he did not enter a valid plea, that he was denied a trial de novo when he appealed from General Sessions Court to Criminal Court, and that he was prejudiced by the deficient performance of counsel. For the reasons that follow, we hold that the petitioner has established constitutional error and is entitled to post-conviction relief.

We begin with a review of the relevant law. The burden in a post-conviction proceeding is on the petitioner to prove her grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel’s performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to a general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove prejudice by showing that but for counsel’s errors, the petitioner would not have entered the plea and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either

the deficiency or prejudice prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court stated that the standard is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). These circumstances include

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). A plea resulting from ignorance, misunderstanding, coercion, inducements, or threats is not “voluntary.” Id.

The trial court is charged with determining if the guilty plea is “knowing” by questioning the defendant to make sure he fully understands the plea and its consequences. State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999); Blankenship, 858 S.W.2d at 904. In Boykin v. Alabama, the United States Supreme Court stated that certain constitutional rights are implicated in a plea of guilty, namely, the right to a trial by jury, the right to confront witnesses, and the right against compelled self-incrimination, and that it would not presume a waiver of these three important rights from a silent record. 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969).

In the present case, it is undisputed that the petitioner’s General Sessions Court judgment was modified by an amended judgment which noted the judgment was by guilty plea and changed the percentage of service required for the sentence. It does not matter whether or not the defendant agreed to the modification at the time, because it is clear that he was not advised of his constitutional rights and given the opportunity to waive those rights in any court proceeding. Further, it is undisputed that trial counsel agreed with the state to modify the sentence without affording the petitioner a guilty plea hearing at which the petitioner was assured admonition of his rights as a predicate to a knowing, voluntary, and intelligent plea. As such, we hold that the evidence preponderates against the trial court’s determination that the petitioner did not establish his claims by clear and convincing evidence. The petitioner is entitled to post-conviction relief in the form of his underlying case being returned to the point at which he appealed the bench trial in General Sessions Court. His conviction as reflected in the amended judgment is vacated, the original General Sessions conviction is reinstated, and he is entitled to a trial de novo on the underlying assault charge in Criminal Court.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is reversed. The case is remanded for further proceedings consistent with this opinion.

JOSEPH M. TIPTON, PRESIDING JUDGE